

The Great Seal of the State of Arizona is a circular emblem. The outer ring contains the text "GREAT SEAL OF THE STATE OF ARIZONA" at the top and "1912" at the bottom, flanked by two stars. The inner circle features a shield with a landscape scene: a person on horseback, a mountain range, and a river. Above the shield is a banner with the Latin motto "DITAT DEUS".

Appeals Board No. T-1020118-001-B

In the Matter of:

X STATE OF ARIZONA ESA-TAX UNIT
% ROBERT DUNN III,
ASSISTANT ATTORNEY GENERAL
1275 W. WASHINGTON ST - CFP/CLA
PHOENIX, AZ 85007-2926

Employer

Department

DECISION
AFFIRMED

THE **EMPLOYER**, through counsel, petitions for hearing from the Reconsidered Determination issued by the Department on June 19, 2006, which affirmed the Department's Determination of Unemployment Insurance Liability (Exh. 7), and the Department's Determination of Liability for Employment or Wages (Exh. 8), issued on May 2, 2006, and held that services performed by individuals as salesperson constitute employment and remuneration paid to individuals for such services constitutes wages.

The reconsidered Determination also specified that:

... remuneration received constituted wages for the quarters ending June 30, 2003, September 30, 2003, December 31, 2003, March 31, 2004, June 30, 2004, September 30, 2004, December 31, 2004, March 31, 2005, June 30, 2005, and September 30, 2005. (Bd. Exh. 4).

The petition for hearing has been timely filed. The Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

At the direction of the Appeals Board and following proper notice to all parties, a hearing was conducted on January 17, 2007, in Phoenix, Arizona, before ROBERT T. NALL, Administrative Law Judge, for the purpose of receiving evidence in order to consider the following issues:

- A. Whether the employing unit is liable for Arizona Unemployment Insurance taxes beginning with the quarter ending June 30, 2003, under A.R.S. § 23-613.
- B. Whether services performed by individuals, as salespersons, constitute “employment” as defined in A.R.S. § 23-615, and are not “exempt” or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.
- C. Whether remuneration paid to individuals for such services constitutes “wages” as defined in A.R.S. § 23-622, which must be reported and on which State taxes for unemployment insurance are required to be paid.

The following persons appeared at the hearing: two Employer witnesses who testified, Employer’s counsel, two Department witnesses who testified, and the Assistant Attorney General as the Department’s counsel. At the hearing, Board Exhibits 1 through 17G were admitted into the record as evidence.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer operated as a Limited Liability Corporation that is licensed by Arizona to resell manufactured homes in manufactured housing communities. Its owner has operated under a manufactured housing broker license since May 2000 (Tr. pp. 22, 23; Bd. Exh. 11).
2. All of the persons who were authorized to sell manufactured homes under the Broker of Manufactured Homes or Mobile Homes license maintained by the Employer’s owner, were themselves separately licensed by Arizona to sell manufactured housing units. Specifically, all were licensed by the Office of Manufactured Housing as part of the Arizona Department of Fire, Building and Life Safety (name effective July 1, 2006) under A.R.S. §§ 41-2141, *et seq.*, and Arizona Administrative Code, Sections R-4-34-101, *et seq.* (Tr. pp. 22, 27, 51, 52; Bd. Exh. 10).
3. Most of the licensed manufactured housing salespersons who acted on behalf of the Employer worked from their own homes, occasionally listing and showing manufactured homes for sale in established residential parks. The Employer did not provide them an office, computers or a place to work. Whenever a customer listed for sale or purchased a manufactured home, the licensed manufactured home salespersons would prepare an exclusive listing agreement or a purchase agreement using customized forms that were provided by the Employer in order

to meet State legal requirements. The Employer paid each licensed manufactured home salesperson a commission upon completion of the purchase transaction. (Tr. pp. 27-35, 40, 46-49, 60; Bd. Exhs. 12, 13).

4. Three licensed manufactured housing salespersons also participated in selling newly-manufactured homes from the factory, commencing August 2003 through January 2006. The new manufactured housing sales business was operated during that period from an office provided by the Employer, wherein the salespersons used a computer provided by the Employer. These manufactured home salespersons showed model display manufactured homes provided by the Employer. The newly-manufactured home selling business operated under the trade name of "X", which was used by the Employer during that period (Tr. pp. 24, 29, 44, 45, 52-54, 63-70).
5. The Employer operates under a manufactured housing broker's license. That broker simultaneously operates a separate real estate company. She has maintained an office and a designated real estate broker's license to sell real estate properties since May 2002 (Tr. pp. 23, 30, 42). Because the sale of real estate is not permitted under any license to sell manufactured homes or mobile homes, none of the licensed manufactured home salespersons were allowed by the Employer to sell real estate. The licensed manufactured housing salespeople sold only the manufactured home itself (Tr. pp. 50, 51, 55-57).
6. All of the licensed manufactured home salespersons lived in residential manufactured home parks. All were retired. None of the licensed salespersons made any significant monetary investment in the sales enterprise (Tr. pp. 30, 31, 34, 36).
7. Licensed manufactured home salespersons are prohibited from working for more than one licensed broker at any time. They could utilize a substitute salesperson on occasion, if that person was also licensed. If the licensed salesperson left the Employer to work with a different broker or manufactured home reseller, the salesperson was free to take their manufactured home sales license with him or her (Tr. pp. 30, 31, 34, 36).
8. The broker, under whose license the Employer operates, treated the manufactured home licensed salespeople essentially the same as the licensed real estate salespeople who worked separately under her real estate broker's license. This meant that she did not deduct taxes from their commission earnings and she did not report them as employees (Tr. p. 43).
9. The Employer entered into written "independent contractor agreements" with the licensed manufactured home salespersons.

These documents were authored by the broker or by her husband (Tr. pp. 43-46; Bd. Exh. 14).

10. On May 31, 1983, the Office of Manufactured Housing promulgated its Bulletin #83-9 entitled: "Prohibition of Independent Contractor Sales Persons Agreements". (Bd. Exh. 10). The prohibition has not been lifted or amended, and remains in effect currently. In part, the licensing authority cautioned licensees that:

Any agreement which severs the necessary employer/employee relationship between dealer/broker and sales personnel violates state licensing laws and rules and regulations for both parties. ... it is necessary that one who has been certified as being competent to be a qualifying party, actually be in active and direct control of the work being performed.

11. Applicable laws require the participation of a licensed manufactured housing broker in any sales transaction. A licensed manufactured housing salesperson cannot complete a valid sales transaction, without the involvement and approval of a duly-licensed manufactured housing broker.
12. The Employer issued a Miscellaneous Income document, IRS report form 1099, identifying a total of \$13,350 the Employer paid to one of the licensed manufactured home salespersons during 2004. (Tr. p. 72).

The Employer contends that its commissioned manufactured housing salespeople, whose employment is in dispute in this case, are independent contractors, rather than employees. Specifically, the Employer contends that their efforts as commissioned salespeople, who maintain individual licenses to sell manufactured housing units, should be accorded the same exemption from "employee" status that is provided by statute for licensed real estate salespeople (Tr. p. 54; Bd. Exh. 6). The Employer also contends that the Office of Manufactured Housing bulletin is not intended to determine taxable status for the broker and the licensed salespeople (Tr. pp. 57-62; Bd. Exh. 10). The Employer does not cite any case law, or any other legal provision including federal government exemption, expressly applicable to these circumstances.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01(A) provides in part:

Employee; definition; exempt employment

- A. “Employee” means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristics of an independent profession, trade, skill or occupation.
 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
 3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes. [Emphasis added].

* * *

Arizona Revised Statutes § 23-617 provides in part as follows:

“Exempt employment” means employment not considered in determining whether an employing unit constitutes an “employer” under this chapter and includes:

* * *

12. Service performed by an individual for an employing unit as an insurance producer, if all such service performed by the individual for such employing unit is performed for remuneration solely by way of commission.

* * *

14. Service performed by an individual for an employing unit as a licensed real estate broker or a licensed cemetery broker or a licensed real estate salesman or licensed cemetery salesman, if all such service performed by the individual for such em-

employing unit is performed for remuneration solely by way of commission, except that any service performed as a real estate broker, a cemetery broker, a real estate salesman or a cemetery salesman for an employing unit to which the provisions of section 23-750 apply is not exempt employment.

* * *

18. Casual labor not in the course of the employer's trade or business.
19. Service performed by an individual for an employing unit as a securities salesman, if all such service performed by the individual for such employing unit is performed for remuneration solely by way of commission, ...

* * *

22. Service performed by individuals solely to the extent that the compensation includes commissions, overrides or profits realized on sales primarily resulting from the in-person solicitation of orders for or making sales of consumer goods in the home, ...
23. Services performed by an individual for an employing unit in the preparation of tax returns and related schedules and documents, if all such services are performed for remuneration solely by way of commissions, independent of the control of the employing unit, ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be affected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 2. "Method" is defined as the way, procedure or process for doing something; the means used

in attaining a result as distinguished from the result itself.

B. “Employee” as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit “. . . solely because of a provision of law regulating the organization, trade or business of the employing unit”. This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
 - a. “Solely” means, but is not limited to: Only, alone, exclusively, without other.
 - b. “Provision of law” includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
 - c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.
[Emphasis added].

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor rather than an employee, are enumerated in Arizona Administrative Code, Section R6-3-1723(E), i.e.: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

When applying the guidelines set forth in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes consideration of the following factors:

- a. Authority over Individual's Assistants
Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

None of the licensed salespersons used paid assistants. This factor is neutral, with no impact on the crucial issue.
- b. Compliance with Instructions
Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

The Employer is a licensed broker who must remain legally responsible for all sales transactions. Control exists in every finalized sales transaction. This factor demonstrates employment.
- c. Oral or Written Reports
If regular oral or written reports bearing upon the method in which the services are performed must be submitted to

the employing unit, it indicates control in that the worker is required to account for his actions.

Contract forms containing mandatory language are provided by the Employer as essential elements of every listing and every finalized sale. The practice, however, is that the broker becomes involved when completing the sales transaction without routine interim progress reports. This factor indicates independence.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

For three licensed salespersons, the work was performed on premises and indicates control. For all other licensed salespersons, work was performed entirely off the Employer's premises, thus indicating independence.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

Any licensed salesperson was entitled to substitute another licensed salesperson without the broker's prior consent. This factor indicates independence.

f. Establishment of Work Sequence

If a person must perform services in the order set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routine and schedules of the employing unit.

Sales transactions require certain specified steps necessary in the industry, such as a valid listing agreement or "Employment Agreement" (Exhs. 12G, 12V, 12Y), and exchanges of offers, counteroffers, and disclosures. Finalization requires participation by the Employer as the licensed broker. Missing crucial steps in the mandatory sequence could trigger additional costs and could invalidate a transaction. This factor indicates employment.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

The licensed broker retains the statutory right to deny consent or authorization, and always could preclude the licensed salesperson from using the business name and crucial documents. No contractual penalty is specified for termination, including liquidated damages. This factor indicates employment.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is the right of an independent worker.

The practice allowed each licensed manufactured housing salesperson to keep irregular hours. This factor indicates independence.

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

No formal training was undertaken because all workers already possessed the required salesperson license. This factor indicates independence.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The practice allowed each licensed salesperson to work irregular hours at will. No minimum level of time or periodic effort was specified by the licensed broker. The only prohibition was working simultaneously with another licensed broker. This factor indicates independence.

k. Tools and Materials

If an employing unit provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

The only tools and materials involved were the contractual documents provided by the Employer, which contains language that the Employer is required by law to ensure exists throughout each completed sales transaction. No worker provided the means to do the job. This factor indicates employment.

i. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

No expenses were reimbursable. This factor indicates independence.

The following additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E) also are significant and appropriate for consideration in determining the relationship of the parties:

1. Availability to the Public

Generally, an independent contractor makes his or her services available to the general public, while an employee does not.

All licensed salespeople were prohibited by law from simultaneously working with another licensed broker. Although any member of the public would be a potential customer, no sales of manufactured housing were available without the auspices of a licensed broker. This factor indicates employment.

2. Compensation

Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

Payment was calculated strictly on a commissioned sales basis. This factor indicates independence, but is not dispositive because employees often work on commission.

3. Realization of Profit or Loss
An employee generally is not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

The licensed salespersons were not required to invest anything beyond their personal time and efforts. Enhanced efforts would not result in a higher commission, and lack of diligence would not reduce the commission amount. This factor indicates employment.
4. Obligation
An employee usually has the right to end the relationship with an Employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

Each licensed salesperson could cease efforts at any time without penalty to the Employer. The lack of liquidated penalties for non-completion indicates employment.
5. Significant Investment.
A significant investment, by the worker, in equipment and facilities would indicate an independent status. The furnishing of all necessary equipment and facilities by the employing unit would indicate the existence of an employee relationship.

The licensed salespersons were not required or permitted to invest anything beyond their personal time and efforts. This factor indicates employment.
6. Simultaneous Contracts
An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

All licensed salespeople were prohibited by law from simultaneously working with another licensed broker. Although any member of the public would be a potential customer, no sales of manufactured housing were available without the auspices of a licensed broker. This factor indicates employment.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), other factors not specifically identified in the rule subsections also may be considered.

One such crucial factor in this case is the complete absence of any legal authority for treating persons who are licensed to sell manufactured housing as subject to the exemption specifically afforded to persons who are licensed to sell real estate. Licensed real estate salespersons enjoy exemption from employee status pursuant to Arizona Revised Statutes § 23-617(14), and Arizona Administrative Code, Section R6-3-1725. The existence of exemptions specifically listed for other industries confirms that the Arizona Legislature deliberately set aside and authorized special non-employee status for licensed real estate salespeople. The Legislature also specifically and deliberately set aside other enumerated industries such as insurance, securities, tax returns and direct sales of consumer goods in the home. The Unemployment Insurance taxation treatment is similar to enumerated exemptions for professional athletes, elected officials, students, clergy, and prison inmates.

None of these specifically-listed exemptions applies to the industry in which the Employer and its salespersons admittedly engaged. The statutes and rules confirm that the Arizona Legislature deliberately did not include licensed manufactured housing salespersons in any listed exemption from employment status. Thus, we conclude that no exemption from employment status can be extended to the licensed retail sales of manufactured homes. No evidence was presented demonstrating that manufactured home salespersons undertake the substantial course of study and pass a comprehensive examination required of licensed real estate salespersons. Unless the factors required to be considered yield an obvious conclusion otherwise, a decision to include a similar industry for which the Legislature already set forth specifically-mandated requirements yet did not include amongst a list of exempted industries, would be fiat not authorized by the Arizona Legislature.

In addition, the Arizona licensing authority expressly has prohibited the application of independent contractor status between a licensed manufactured homes broker and all licensed salespersons engaged in the sale of manufactured homes for that broker. The licensing authority warned that professional discipline potentially could arise from claims of independent contractor status, due to the essential control over the entire manufactured home sales process that must be exercised by the licensed broker.

Prior existence of this written prohibition (Bd. Exh. 10) cuts to the heart of the arguments by the Employer and its counsel that the Employer exercised no control at all over activities by the licensed salespersons of manufactured homes. The prohibition of independent contractor status in this industry minimizes the value of the written independent contractor agreements drafted by the Employer and presented in this case. The Arizona licensing authority requires the licensed manufactured housing broker to exercise control over the sales transaction, and to exercise control over the licensed manufactured housing

salespersons whose status is the subject of this appeal. This factor not only is strongly indicative of control, but extends further by conclusively establishing that the relationship must be that of employer and employee.

We conclude that the industry-specific legal mandate upon the licensed manufactured home broker to exercise control is an essential characteristic of this business relationship. As a license requirement, control must be maintained throughout the process of selling manufactured homes. The legal requirement trumps all other concerns and considerations regarding the issue before us on review. Thus, payments for services rendered in this industry cannot be payments to an independent contractor, and necessarily constitute wages.

The Arizona Court of Appeals, in the case of *Arizona Department of Economic Security v. Little*, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given the long-established liberal construction in an effort to include as many types of employment relationships as possible, when the Court held:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals in the case of *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court ruled:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In this case, the factors that tend to support the Employer's contention of independent contractor relationship include the existence of signed "independent contractor agreements" (Bd. Exh. 17), existence of a professional license requirement, the consistent payment of commissions followed by a Form 1099, the lack of micromanaged sales activities, the lack of paid assistants, the ability to terminate the arrangement at any time, the opportunity to hire a similarly-licensed substitute, and the ability of licensed salespersons to work from their homes.

Factors that are characteristic of independence include the absence of set hours for work, the lack of extensive training and meetings, the lack of office space provided to all but three of the licensed manufactured home salespersons,

and the freedom to work any hours with any potential customer. However, we conclude that the evidence of employee status outweighs these factors.

Although the individual licensed manufactured home salespersons were not necessarily required to comply with instructions about when, where or how the salesperson was to perform their essential duties, the control factor is present in this case because the Employer has the right to instruct or direct any licensed manufactured housing salesperson. The Employer's consent as a licensed broker is a legally required and essential ingredient to every completed sales transaction. Liabilities arising from defects and departures from instructions could run to the Employer, as the licensed broker who oversaw and who authorized the sales transaction. The Employer, operating with or as a licensed broker, was required to include certain mandatory steps and language in each transaction with the public.

An argument could be made that the licensed manufactured home salespersons are subject to the broker's direction, rule or control "... solely because of a provision of law regulating the organization, trade or business of the employing unit". We agree that this is a regulated industry in which all sales for a fee require a licensed broker, who is the qualifying party for any licensed manufactured home salesperson. The Employment Security Law of Arizona applies an exception provision:

... in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit." Arizona Revised Statutes § 23-613.01(A)(2) and Arizona Administrative Code, Section R6-3-1723(B)(2).

We perceive a plethora of legitimate reasons why a fee-charging salesperson must be under the control and supervision of a licensed broker, including but not limited to the potential for incomplete disclosures, fraud and overreaching, or other behaviors that could make one person or entity liable for damages incurred by another. The definitive requirement, "solely" by reason of provisions codifying professional requirements, is not met by the evidence in this case.

The licensing agency phrased the distinction succinctly in 1983, by recognizing a far more inclusive and more extensive obligation exists to the public as follows:

The law clearly requires a qualifying party for a license to have active and direct supervision and direct responsibility for all operations of that particular licensed business. An "independent contractor" by the very nature of that status would not be under the control or responsibility of the qualifying party for the license. (Bd. Exh. 10).

We conclude that the factors tending to support an employer/employee relationship in this case include: the lack of any statutory exclusion from employee status when other industries are specifically excluded, the provision of an office plus a computer and other supplies to at least three licensed salespersons, the legal prohibition against working simultaneously for more than one licensed broker, the lack of significant investment by the licensed manufactured home salespersons, the lack of recurring liabilities or expenditures by the licensed salespersons thereby averting an independent profit or loss risk to the salesperson, the provision of customized sales documents by the broker to facilitate all sales, the existence of control required by law and by the licensing authority, and the licensing authority's specific prohibition of independent contractor status between a licensed broker and licensed salespeople.

We find that absence of significant investment, coupled with insulation from the risk of loss inherent in such business investment, are determinative elements in finding that the workers were employees rather than independent contractors. Similarly, we find that the exclusivity of the work efforts, as each licensed manufactured home salesperson always was legally prohibited from working simultaneously for any other broker, is a determinative element in finding that the workers were employees rather than independent contractors. We find that the provision of an office, model homes, name badges, logo shirts, and a computer to the three licensed manufactured home salespersons who were allowed to sell new manufactured homes is another determinative element in finding that the workers were employees rather than independent contractors.

The Employer, through counsel, implies that the broker's relationship with the three licensed manufactured home salespeople who sold new homes should be treated differently from the similar arrangement with those licensed manufactured home salespersons who always sold used manufactured homes. However, the provision of useful tools and materials was not limited to the three newly-manufactured home salespeople. The broker admittedly provided customized forms essential to commencing and completing each sales transaction, to all salespersons. The broker testified that she did so in order to fulfill her own license obligations to ensure that certain mandatory language

must be included in all sales listings and contracts. No evidence was presented that any salesperson chose to express independence by redrafting different selling documents. Further, the licensing authority makes no material distinction between licensed sales of new and used manufactured homes.

We find that the payment on a per-job basis by commissions, rather than some other method of calculation, does not require a conclusion that this relationship is with independent contractors. Similarly, the existence of independent contractor agreements remains a device useful to allow an argument that the relationship is not employment. However, by law the licensed manufactured home salesperson cannot be truly independent in their actions. The licensed manufactured home salesperson cannot legitimately sell new or used manufactured homes for a fee, without the involvement of one licensed broker for each such effort. Certain mandatory language is required. None of the licensed manufactured home salespersons could hold their services out to the general public directly, because the involvement of one licensed broker is required by law. Simultaneous contracts with more than one broker are prohibited. Hence, these factors favor employment status.

The enumerated factors that are not directly applicable to our considerations, based upon the evidence presented in this case, include the absence of evidence that any compensatory payment was designated as hourly wages, and lack of assistants over whom the individuals could exercise authority. These factors are neutral in this case.

We have thoroughly examined the factors established as present by the facts in this case, and we have considered the relevant law and administrative rules as they are applicable to those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Subsections R6-3-1723(D) and (E). We conclude that the existence of signed "independent contractor agreements" does not define the relationship involved in this industry, and does not remove the relationship from employment status for taxation purposes. The legal requirements of the licenses involved carry far more weight than whatever paperwork the licensees chose to sign (Exh. 14). We conclude that the services performed by individuals as licensed salespersons of manufactured homes, under the Employer's manufactured home broker license, constitute employment.

Arizona Revised Statutes § 23-622(A) defines "wages" as:

"Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. ...

Arizona Administrative Code, Section R6-3-1705(B) provides in pertinent part:

The name by which the remuneration for employment, or potential employment as provided in ... [A.A.C. R6-3-1705(G)], is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly, annual or other basis. The remuneration may also be paid on the basis of an estimated or agreed upon amount in order to resolve an issue arising out of an employment or potential employment relationship.

In this case, the Employer paid commissions to the licensed salespersons, based upon their consummated sales of manufactured homes (Bd. Exh. 13). We conclude from the evidence that such remuneration constitutes wages as contemplated by the applicable statutes and administrative rules. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination issued on June 19, 2006.

1. Services performed by individuals as licensed manufactured home salespersons constitute **Employment** as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are **Employees** within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.
2. The remuneration paid to individuals for the services performed constitutes **Wages** within the meaning of A.R.S. § 23-622, which must be reported and on which state taxes for unemployment insurance are required to be paid.

3. The Employer **is liable** for Arizona Unemployment Insurance taxes on wages for the quarters ending June 30, 2003, September 30, 2003, December 31, 2003, March 31, 2004, June 30, 2004, September 30, 2004, December 31, 2004, March 31, 2005, June 30, 2005, and September 30, 2005, under A.R.S. § 23-613.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

**INSTRUCTIONS FOR FILING A REQUEST FOR
REVIEW OF THE BOARD'S DECISION**

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
 2. Parties may be represented in the following manner:

An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
 3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.
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A copy of the foregoing was mailed on
to:

Er: X

Acct. No: X

- (x) Er. Rep.: JAMES C. FRISCH
KING & FRISCH, P.C.
- (x) ROBERT DUNN, III, ASSISTANT ATTORNEY GENERAL
1275 W WASHINGTON
PHOENIX, AZ 85007-2926
- (x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT SECURITY ADMINISTRATION
P O BOX 6028 - 911B
PHOENIX, AZ 85005

By: _____
For The Appeals Board